

PRIVATE SATELLITE CARRIAGE

Section 310(b) covers "common carrier . . . radio licenses."⁶⁴ By implication, section 310(b) does not cover private carriers employing radio licenses. Thus, the FCC has repeatedly held that section 310(b) does not restrict licensing aliens from operating satellite earth stations on a private, non-common carrier basis.⁶⁵ The FCC stated in *Reuters Information Services, Inc.* in 1989: "Although the applicant is 100% foreign owned and controlled, alien ownership and control of Reuters does not prohibit the FCC from licensing it to operate the subject earth station on a private, non-common carrier basis."⁶⁶ Likewise, in *Burroughs Wellcome*, the FCC licensed a wholly owned subsidiary of a British corporation to operate an INTELSAT earth station.⁶⁷ Further, in *COMSAT Earth Stations*, a subsidiary of a Palauan corporation with mostly Palauan officers, directors, and shareholders was licensed to operate an earth station on its own territory.⁶⁸

There can be no question that the FCC has correctly interpreted section 310(b) with respect to private satellite carriage. But the mere fact that a distinction is drawn between private carriage and common carriage is curious, for that distinction, like the exemption for alien amateur radio licensees, erodes the national security rationale for applying section 310(b) to *any* radio service. If a foreigner is intent on harming the U.S., how does it possibly advance U.S. national security to forbid him from providing wireless common carriage while

Flores de Otero, 426 U.S. 572 (1976); *Nyquist v. Mauclet*, 432 U.S. 1 (1977). The logic underlying that choice of standard of review would apply a fortiori in the case of a municipal franchising statute that discriminated against aliens lawfully residing in the U.S.

64. 47 U.S.C. § 310(b).

65. See, e.g., *Panamsat Carrier Servs., Inc.*, 10 F.C.C. Rcd. 928 (1995).

66. 4 F.C.C. Rcd. 5982, 5982-83 ¶ 6 (1989).

67. *Burroughs Wellcome Co.*, 4 F.C.C. Rcd. 7190 (1989).

68. *COMSAT Earth Stations, Inc.*, 8 F.C.C. Rcd. 7607 (1993).

allowing him to provide wireless private carriage of messages by satellite to and from U.S. territory? A well-financed enemy of the U.S. would be perfectly happy to be licensed to transmit sensitive information by satellite on a private carriage basis and forgo the opportunity to hold out his transmission capacity for hire on a common carrier basis.

To place matters in perspective, the private carriage in which Reuters lawfully engages today through its licensed satellite earth stations in the U.S. is the instantaneous, worldwide transmission of vast amounts of financial data relating to commodity and currency trades.⁶⁹ In any given second, Reuters probably transmits more bits of information than the German wireless station on Long Island transmitted during the entire period it operated before the U.S. government confiscated its facilities in 1916. Again, the point is not that Congress and the FCC are wrong not to restrict foreign ownership in radio licenses necessary for private satellite carriage. Rather, the point is that the lack of anxiety over granting such licenses to foreigners makes it impossible to explain why, for example, any anxiety should arise from the prospect of a foreigner being given the unrestricted right to invest in a cellular telephony licensee.

PRIVATE LAND MOBILE SERVICES

Traditionally, some land-based mobile radio services were classified as "private land mobile services" under section 332 of the Communications Act.⁷⁰ These services included the dispatch services used by taxicabs, or services that offered carriage for hire to small groups of unaffiliated users.⁷¹ As

69. *See, e.g.*, REUTERS HOLDINGS PLC, 1991 ANNUAL REPORT 2, 8, 12, 17 (1992).

70. 47 U.S.C. § 332.

71. *See Inquiry Relative to the Future Use of the Frequency Band 806-960 Mhz*, Second Report and Order, Dkt. No. 18262, 46 F.C.C.2d 752 (1974).

private carriers, they did not come under section 310(b) because of the exemption for private radio licensees enacted in 1974.

The Omnibus Budget Reconciliation Act of 1993⁷² amended section 332, bumping certain land-based mobile services that had formerly been considered private carriers into the category of common carriers.⁷³ All providers of a new category of “commercial mobile services,” would be treated as common carriers.⁷⁴ Commercial mobile services include any interconnected mobile service provided to the public or a substantial portion of the public for profit.⁷⁵ Not every mobile service provider, however, fits in this category; some will remain private carriers, exempt from section 310(b).⁷⁶ But some mobile services that do fall within the new category will come under the common carrier regime, including section 310(b), for the first time.⁷⁷ The statute does not specify which services will be reclassified. That decision is left to the FCC.

Nevertheless, new section 332(c)(6) permits the FCC to waive the application of section 310(b) to foreign ownership interests in mobile services recategorized as common carriers by the 1993 Budget Act, so long as the foreign interest lawfully existed before May 24, 1993.⁷⁸ Congress’s intent was to “grandfather” only the individual who held the interest on that date; future foreign owners are not covered by the waiver.⁷⁹

72. Pub. L. No. 103-66, 107 Stat. 312.

73. 47 U.S.C. § 332.

74. *Id.* § 332(c)(1)(A).

75. *Id.* § 332(d)(1).

76. *Id.* § 332(c)(2); Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, Second Report and Order, GN Dkt. No. 93-252, 9 F.C.C. Rcd. 1411 (1994) [hereinafter *Second Mobile Services Report*].

77. Implementation of Sections 3(n) and 332 of the Communications Act: Regulatory Treatment of Mobile Services, First Report and Order, GN Dkt. No. 93-252, 9 F.C.C. Rcd. 1056 (1994) [hereinafter *First Mobile Services Report*].

78. 47 U.S.C. § 332(c)(6).

79. *First Mobile Services Report*, 9 F.C.C. Rcd. at 1056 ¶ 2 & n.4.

Thus, the FCC will grant waivers only on condition that the extent of foreign ownership in the service not increase above the pre-May 24, 1993 level.⁸⁰ No subsequent transfer of ownership may be made in violation of section 310(b).⁸¹ Requests for waivers had to be filed within six months of the date of enactment of the 1993 Budget Act—that is, by February 10, 1994.⁸²

When the FCC first established guidelines for filing the waivers, it estimated that the final rules determining exactly which mobile services would be reclassified as common carriers might not be available before the filing deadline.⁸³ The FCC urged private land mobile services to file for a waiver if there was “any chance at all” that the service might be reclassified as common carriage.⁸⁴ The FCC issued its first reclassification ruling in March 1994, moving services such as some “private” paging into the commercial mobile service category.⁸⁵

SUBSCRIPTION VIDEO SERVICES

As mentioned above, section 310(b) is, by its terms, not applicable to private use licensees. The FCC extended this rationale in 1989 to exempt subscription video services, including subscription DBS, from section 310(b).⁸⁶

The United States Satellite Broadcasting Company (USSB) objected to the exemption of subscription DBS from section 310(b) because it had proposed to offer DBS as an

80. 47 U.S.C. § 332(c)(6)(A).

81. *Id.* § 332(c)(6)(B).

82. *Id.* § 332(c)(6).

83. *First Mobile Services Report*, 9 F.C.C. Rcd. at 1057 ¶ 7.

84. *Id.* at 1057 ¶ 8.

85. *Second Mobile Services Report*, 9 F.C.C. Rcd. at 1452–1453 ¶ 96–99; see Amendment of Parts 2 and 90 of the Commission’s Rules to Provide for the Use of 200 Channels, 1995 FCC LEXIS 2614 (Apr. 17, 1995).

86. See Subscription Video Services, Memorandum Opinion and Order, GEN Dkt. No. 85-305, 4 F.C.C. Rcd. 4948 (1989).

advertiser-supported (free) broadcast service.⁸⁷ USSB would thus be subject to section 310(b); its closest competitors, other satellite video distribution systems that operated subscription services as the customer-programmers of common carriers, would not be subject to 310(b). USSB contended that “its ability to raise financing in foreign countries will be unfairly and adversely affected by the application of section 310(b) to licensees but not customer-programmers that will be competing with licensees.”⁸⁸ The FCC declined to “impose regulatory burdens on nonbroadcast services, where such burdens are not required nor in the public interest, simply because broadcasters are subject to those restraints [N]either the letter nor the intent of [section 310(b)] supports application of alien ownership restrictions to the customers of common carriers, who do not own or control communications facilities.”⁸⁹ The FCC also pointed out that the common carrier licensee from whom the programmer obtains access to transmission facilities is already subject to the benchmarks.⁹⁰

At the time of the FCC’s decision, subscription video services were a commercial flop. Since 1989, however, the wireless delivery of broadband has grown in commercial viability and would seem likely to continue growing if the FCC allocates sufficient spectrum for such services.

Today, there are multiple technologies both for DBS service and for terrestrial wireless systems.⁹¹ The two leading terrestrial services are “wireless cable,” or multichannel multipoint distribution service (MMDS), which uses line-of-sight microwave radio channels in the 2.1 GHz and 2.5 GHz

87. *Id.* at 4948 ¶¶ 2–3.

88. *Id.* at 4948 ¶ 3.

89. *Id.* at 4948 ¶¶ 4–5.

90. *Id.* at 4948 ¶ 5.

91. For a survey of these services and an assessment of their commercial viability, see LELAND L. JOHNSON, *TOWARD COMPETITION IN CABLE TELEVISION* 111–48 (MIT Press & AEI Press 1994).

bands, and local multipoint distribution service (LMDS), which uses an omnidirectional antenna in each of many cells to transmit in the 27.5 to 29.5 GHz range.⁹² Although intellectual consistency is not the FCC's hallmark, the logic of its 1989 decision on subscription video, if extended to these two new wireless broadband technologies, would exempt them from section 310(b).

There is another potential terrestrial wireless service for subscription-based video: the local television broadcaster. Using digital compression, existing television broadcasters could offer multiple channels of video programming in their existing 6 MHz assignments for over-the-air broadcasting.⁹³ Some of those compressed channels could be offered on a subscription basis. If this scenario develops, television broadcasters will have an odd but powerful argument concerning foreign ownership: The frequencies carrying their "free" compressed channels are subject to section 310(b), but the frequencies carrying their subscriber-based compressed channels are not. In turn, this differential regulation of foreign investment could induce a reconfiguration of the ownership of television broadcast companies to take advantage of foreign capital to a greater extent.

STATUTORY MISINTERPRETATION OF SECTION 310(b)(4)

For years the FCC has misread the plain language of the key subsection of the foreign ownership restrictions in the Communications Act. Section 310(b)(4) allows foreign ownership of the holding company of a communications licensee to exceed 25 percent but gives the FCC the discretion to deny or withdraw the license—"if the Commission finds that the public interest

92. *See id.* at 128, 134-35.

93. *See id.* at 137-47.

will be served by the refusal or revocation of such license.”⁹⁴ A treatise on international telecommunications regulation compiled by the Federal Communications Bar Association in 1993 supports this reading of the statute:

Under the terms of the statute, the Commission must find that a *refusal* of the license to a company in which alien ownership in its holding company exceeds the twenty-five percent benchmark serves the public interest. Therefore, the onus is on the Commission to prove that the relaxed public interest standard mandates a refusal of the license request.⁹⁵

Although this interpretation is the only one consistent with the statute’s straightforward use of the English language, it presumes innocently that the Communications Act means what it says rather than what the FCC’s lawyers say that it means.

The FCC regards its discretion under section 310(b)(4) to be broad—so broad as to authorize the agency to reverse the burden of proof that Congress specified. The FCC presumes foreign investment in an American holding company exceeding 25 percent to be unlawful, such that the applicant must prove to the FCC’s satisfaction that the agency’s grant of a *waiver* of that putative ceiling on foreign ownership would affirmatively *serve* the public interest in the applicant’s particular facts and circumstances. In *PrimeMedia Broadcasting, Inc.*, the FCC succinctly and erroneously stated in 1988 that “alien equity interests in a parent corporation . . . may only amount to 25%, *unless* the Commission finds that the public interest would be

94. 47 U.S.C. § 310(b)(4) (emphasis added).

95. Tara Kalagher Giunta, *Foreign Participation in Telecommunications Projects*, in FEDERAL COMMUNICATIONS BAR ASSOCIATION, INTERNATIONAL PRACTICE COMMITTEE, INTERNATIONAL COMMUNICATIONS PRACTICE HANDBOOK, 1993 at 43, 44 (Paul J. Berman & Ellen K. Snyder eds. 1993) (emphasis in original).

served.”⁹⁶ Even as recently as February 1995, when the FCC issued a notice of proposed rulemaking addressing in part the question of foreign investment, the agency failed to acknowledge that it had been erroneously applying the statute and declined to solicit any public comment on whether its extravagant claims to discretion in the enforcement of section 310(b)(4) had any basis in law.⁹⁷ “*Under the plain language of the Communications Act and its legislative history,*” the FCC asserted in the NPRM, “the Commission has broad discretion in applying Section 310(b)(4).”⁹⁸

The FCC, of course, has no discretion with which to rewrite an act of Congress. In its committee report accompanying H.R. 1555, the “Communications Act of 1995,” the House Commerce Committee noted that “the Commission has consistently misinterpreted section 310(b)(4) by creating a presumption that foreign investment is not in the public interest if it exceeds 25 percent of the equity of an American radio licensee.”⁹⁹ The Committee further stated that its proposed “amendments to section 310(b) . . . do not constitute congressional acquiescence to the Commission’s past misinterpretation of section 310(b)(4).”¹⁰⁰

Furthermore, even if the FCC’s reading current reading of section 310(b)(4) did not exceed its statutory authority, it would still harm the public interest and thus work results that could only be described as an abuse of agency discretion in violation of the Administrative Procedure Act.¹⁰¹ American telecommunications firms must modernize their infrastructure

96. 3 F.C.C. Rcd. 4293, 4295 ¶ 12 (1988) (emphasis added).

97. Market Entry and Regulation of Foreign-affiliated Entities, Notice of Proposed Rulemaking, IB Dkt. No. 95-22, 10 F.C.C. Rcd. 5256, 5263-65 ¶¶ 15-19, 5293-98 ¶¶ 92-103 (1995).

98. *Id.* at 5294 ¶ 93 (emphasis added).

99. H.R. REP. NO. ___, 104th Cong., 1st Sess. 120-21 (1995).

100. *Id.* at 121.

101. 5 U.S.C. § 706(2)(A).

and forge the global alliances necessary to compete in the provision of full-service networks on an international scale. Such investments and alliances would plainly benefit American consumers. Viewed *ex ante*, opening American telecommunications markets to greater foreign investment should be at least as likely to incline other nations to do likewise as to cause them to maintain or raise barriers to incoming U.S. investment. For these reasons, there should be a very strong presumption that it would *disserve* the public interest for the FCC to refuse or revoke a license of a firm whose holding company is owned more than 25 percent by a citizen of any nation friendly to the U.S. Put differently, it is difficult to hypothesize *any* legitimate, rational public purpose that would be served by discouraging investment by friendly foreigners in the American telecommunications industry.

No court has addressed the FCC's remarkable misinterpretation of section 310(b)—and for an entirely predictable, pragmatic reason. No telecommunications lawyer knowledgeable in the ways of the FCC could responsibly advise her foreign client not to be prepared to bear the burden of proving that its investment would advance the public interest. And no foreign firm expected to make such a showing is about to accuse its future regulator of lawlessness in its reading of section 310(b)(4). But lawlessness correctly describes the FCC's conduct: Its misinterpretation of section 310(b)(4) is "the law" only in appearance. If a court ever faces the question of how the FCC has inverted the burden of proof and agency discretion conferred by section 310(b)(4), it will have ample grounds to take exception to the usual rule in administrative law of deferring, under *Chevron*, to the agency's interpretation of its organic statute.¹⁰²

102. *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

WAIVERS OF SECTION 310(b)(4)

The FCC has made the process by which one applies for permission to exceed the foreign ownership limits equivalent to a petition for waiver of such limits. Because the Communications Act by its very language never contemplated that the FCC would enforce section 310(b)(4) through the current process, it follows that the statute fails to instruct the FCC on how to decide when to waive the restrictions on foreign ownership and control.

The FCC's answer to this dilemma has been, once more, to claim broad discretion. When presented with a petition for waiver, the FCC has stated that it need only enforce the alien ownership and management restrictions if it finds that "the public interest . . . would *require* the radio licenses to be revoked or license renewals denied."¹⁰³ As we shall see in chapter 4, the waiver process has become extremely complex and has affected in minute detail how foreigners structure the ownership and control of their investments in U.S. telecommunications firms.

RELATED PROVISIONS IN THE COMMUNICATIONS ACT

Five other provisions of the Communications Act are pertinent to foreign involvement in U.S. telecommunications and thus must be read in conjunction with section 310(b).

Section 310(a)

The first such provision, section 310(a), is a model of brevity: "The station license required under this Act shall not be granted

103. General Elec. Co., 5 F.C.C. Rcd. 1335, 1335 ¶ 5 (Common Carrier Bureau 1990) (emphasis added).

to or held by any foreign government or the representative thereof.”¹⁰⁴ Unlike section 310(b), section 310(a) applies to both common and private carriers, including, for example, satellite earth stations constructed for private carriage¹⁰⁵ and mobile services.¹⁰⁶ The FCC interprets the section to prohibit either de facto or de jure control of radio licenses.¹⁰⁷ Foreign governments may enter into limited partnerships with licensees, so long as the licensee exercises full control over the operation of the system.¹⁰⁸ The FCC may consult with the executive branch in determining whether a violation of section 310(a) is threatened.¹⁰⁹ Section 305(d), added in 1962, permits the President to authorize foreign governments to operate a low-power radio station at the site of its embassy.¹¹⁰

Obviously, the section does not prevent a foreign government or its representative from using radio carriage facilities as a customer of a common carrier. Likewise, the section does not generally bar a company from contracting with a foreign government or its representative to operate private carriage facilities on the foreigner’s behalf. For example, the FCC approved an arrangement under which Banco Nacional de Mexico (Banamex) asked Satellite Transmission and Reception Specialist (STARS) to build and operate the U.S. end of a transborder satellite service for transmission of Banamex’s private messages between the U.S. and Mexico.¹¹¹ However,

104. 47 U.S.C. § 310(a).

105. Licensing Under Title III of the Communications Act of 1934, as amended, of Non-common Carrier Transmit/Receive Earth Stations Operating with the INTELSAT Global Communications Satellite System, Declaratory Ruling, 8 F.C.C. Rcd. 1387, 1387 n.6 (1993).

106. *First Mobile Services Report*, 9 F.C.C. Rcd. at 1056 n.5.

107. Orion Satellite Corporation Request for Final Authority to Construct, Launch and Operate an International Communications Satellite System, Memorandum Opinion, Order and Authorization, 5 F.C.C. Rcd. 4937 (1990).

108. *Id.* at 4939 ¶ 20.

109. *Id.*

110. 47 U.S.C. § 305(d).

111. STARS, Application for Authority to Modify Its License for a

the FCC does bar specialized mobile radio base station licensees from serving any entity that would not itself be eligible for licensing under FCC rules, so foreign governments or representatives of foreign governments may not use this service.¹¹²

As compared to section 310(b), there has been relatively little litigation involving section 310(a). The FCC has determined that it does not violate section 310(a) to grant a radio license for personal use to an honorary consul of Bolivia, who received no compensation for his services from the Bolivian government.¹¹³ In upholding the grant of a broadcast license to Loyola University, the FCC concluded and the D.C. Circuit agreed that the Pope is not a foreign sovereign for purposes of section 310(a).¹¹⁴ Interesting questions might arise under 310(a) as the governments of other countries begin to privatize their telecommunications networks. It has never been decided whether a privatized telecommunications monopoly would be considered a "representative of a foreign government" in spite of privatization.

Section 214

Foreign carriers or their U.S. affiliates must secure authorization for international service under section 214 of the

9.2-meter Fixed C-band Transmit/Receive Earth Station at Sylmar California (Call Sign E890790) for the Provision of International Services Between the United States and Canada and Mexico via All U.S. Domestic Satellites and the Anik and Morelos Satellite Systems, Memorandum Opinion and Order, 5 F.C.C. Rcd. 3150 (1990).

112. Amendment of Part 90 of the Commission's Rules to Eliminate Separate Licensing of End Users of Specialized Mobile Radio Systems, Notice of Proposed Rule Making, PR Dkt. No. 92-79, 7 F.C.C. Rcd. 2885 (1992); 47 C.F.R. § 90.603(c).

113. Russell G. Simpson, 2 F.C.C.2d 640 (1966).

114. *Noe v. FCC*, 260 F.2d 739 (D.C. Cir. 1958).

Communications Act.¹¹⁵ In issuing such authority on a case-by-case basis, the FCC has sought to prevent undue discrimination by the foreign parent against unaffiliated U.S. carriers. In cases of international resale, the FCC has undertaken to determine whether the foreign country on the other end of an international circuit provides equivalent opportunities to U.S. carriers to resell interconnected private lines.¹¹⁶ In cases of facilities-based carriers, the FCC generally has conditioned its grant of section 214 authorization on the existence of regulatory safeguards to prevent discrimination against U.S. carriers in the terms and conditions of access to foreign markets for the origination and termination of U.S. international traffic, and on annual reporting requirements.¹¹⁷ As discussed in chapter 7, the FCC in 1995 proposed to replace its case-by-case analysis with a rule that would condition the grant of section 214 authorization for a foreign carrier on the agency's determination that U.S. carriers had equivalent access to the foreign carrier's "primary markets."¹¹⁸

Submarine Cable Landing Act

In 1921, Congress passed the Submarine Cable Landing Act, which regulates the granting of licenses for landing or operating cables connecting the U.S. with a foreign country.¹¹⁹ Congress

115. 47 U.S.C. § 214.

116. *E.g.*, Cable & Wireless, Inc., 8 F.C.C. Rcd. 1664 (Common Carrier Bureau 1993); FONOROLA Corp., 7 F.C.C. Rcd. 7312 (1992), *order on recon.*, 9 F.C.C. Rcd. 4066 (1994).

117. Atlantic Tele-Network, Inc., 6 F.C.C. Rcd. 6529 (1991), *review denied*, 8 F.C.C. Rcd. 4776 (1993), *appeal pending sub nom.* Atlantic Tele-Network, Inc. v. FCC, U.S. Court of Appeals, D.C. Circuit, No. 93-1616; Telefónica Larga Distancia de Puerto Rico, 8 F.C.C. Rcd. 106 (1992); AmericaTel Corp., 9 F.C.C. Rcd. 3993 (1994); MCI Comm. Corp., 9 F.C.C. Rcd. 3960 (1994).

118. *Market Entry and Regulation*, 10 F.C.C. Rcd. 5256 (1995).

119. Act of May 27, 1921, ch. 12, § 1, 42 Stat. 8 (subsequently codified

subsequently made this law part of the Communications Act of 1934. Unlike section 310(b), these provisions explicitly contain a congressional mandate for the President to pursue a policy of reciprocity. Given that Congress had thirteen years of experience with the Submarine Cable Landing Act when it enacted the foreign ownership restrictions in the Communications Act in 1934, it is clear that Congress knew how to draft a reciprocity standard for the provision now denominated as section 310(b), had it wanted to do so.

Section 34 of the Communications Act specifies that a person operating a submarine cable between the U.S. and another country must first secure a written license from the President.¹²⁰ By executive order, President Eisenhower delegated this licensing function to the FCC in 1954.¹²¹ The teeth in this law are in the President's power to withhold or revoke licenses under section 35.¹²² After giving "due notice and hearing," the President may withhold or revoke such a license for any of three reasons. One is that such action "will promote the security of the United States."¹²³ Another is that such action "will assist . . . in maintaining the rights or interests of the United States or of its citizens in foreign countries."¹²⁴ Although this factor could justify a policy of reciprocity, the third factor is explicit—the withholding or

at 47 U.S.C. §§ 34–37).

120. 47 U.S.C. § 34. "No person shall land or operate in the United States any submarine cable directly or indirectly connecting the United States with any foreign country, or connecting one portion of the United States with any other portion thereof, unless a written license to land or operate such cable has been issued by the President of the United States. The conditions of this Act . . . shall not apply to cables, all of which including both terminals, lie wholly within the continental United States." *Id.*

121. Exec. Order No. 10,530, § 5(a), 19 FED. REG. 2709 (1954), *reprinted* at 3 U.S.C. § 301 note.

122. 47 U.S.C. § 35.

123. *Id.*

124. *Id.*

revocation of such a license "will assist in securing rights for the landing or operation of cables in foreign countries."¹²⁵ In addition to having the power to revoke or withhold the issuance of a license, the President "may grant such license upon such terms as shall be necessary to assure just and reasonable rates and service in the operation and use of cables so licensed."¹²⁶

The President (or the FCC, acting as his delegate) can enforce violations of the Submarine Cable Landing Act through an injunction forbidding the landing or operating of a cable or compelling its removal.¹²⁷ A knowing violation of section 34 is a misdemeanor punishable by a \$5,000 fine, or imprisonment of not more than one year, or both.¹²⁸

Since receiving delegated authority from the President to enforce the Submarine Cable Landing Act, the FCC has aggressively pursued reciprocal access for U.S. carriers in a number of cases. In *French Telegraph Cable Co.*, the FCC denied a French carrier a license to land and operate a submarine cable for provision of authorized international record communications services from San Francisco and Washington, D.C. in part because the agency determined that France would not grant similar rights to U.S. citizens.¹²⁹ In *Tel-Optic Ltd.*, the FCC refused to take final action on an application for a license because the applicant supplied insufficient information concerning ownership and control of the cable system and its foreign landing points to enable the agency to determine whether the foreign country accorded U.S. carriers the reciprocal treatment required by section 35.¹³⁰ Despite the age

125. *Id.*

126. *Id.* Section 35 also contains the proviso that "[t]he license shall not contain terms or conditions granting to the licensee exclusive rights of landing or of operation in the United States." *Id.*

127. *Id.* § 36.

128. *Id.* § 37.

129. 71 F.C.C.2d 393 (1979).

130. FCC 85-99 (adopted Mar. 1, 1985).

and relative obscurity of the Submarine Cable Landing Act, the recent growth in undersea cables has generated a series of FCC decisions interpreting landing rights.¹³¹

Section 308(c)

An additional provision in the Communications Act permits the FCC, in limited circumstances, to consider reciprocal national treatment when issuing radio licenses. Section 308(c) provides that the FCC, "in granting any license for any station intended or used for commercial communication between the United States . . . and any foreign country, may impose any terms, conditions, or restrictions authorized to be imposed with respect to submarine-cable licenses" under the Submarine Cable Landing Act.¹³² Because section 308(c) is not confined by its text to wireline communications, it enables the FCC to impose a reciprocity condition on the issuance of a radio license, but *only* in the case of an international route.

Presidential Seizure under Section 606

The fourth related provision, section 606, devotes hundreds of words to setting forth the emergency powers of the President to

131. Optel Communications, Inc., 9 F.C.C. Rcd. 6153 (Int'l Bureau 1994); IDB Communications Group, Inc., 8 F.C.C. Rcd. 5222 (Common Carrier Bureau 1993); Telefónica Larga Distancia de Puerto Rico, 8 F.C.C. Rcd. 106 (1992); IDB Communications Group, Inc., 7 F.C.C. Rcd. 6553 (Common Carrier Bureau 1992); Alascom, Inc., 6 F.C.C. Rcd. 2969 (Common Carrier Bureau 1991); Western Union Corp., 4 F.C.C. Rcd. 2219 (Common Carrier Bureau 1989); UNC Inc., 3 F.C.C. Rcd. 7154 (Common Carrier Bureau 1988); General Elec. Co., 3 F.C.C. Rcd. 2803 (Common Carrier Bureau 1988); FTC Communications, Inc., 2 F.C.C. Rcd. 7513 (Common Carrier Bureau 1987); FTC Communications, Inc., 75 F.C.C.2d 15 (1979); Teleprompter Cable Servs., Inc., 35 F.C.C.2d 943 (1972).

132. 47 U.S.C. § 308(c). *See also* S. REP. NO. 781, 73d Cong., 2d Sess. 7 (1934).

seize all radio stations and wireline facilities for communications.¹³³ As chapter 2 explained, this presidential power predates the Communications Act of 1934 and was exercised to its fullest extent by Woodrow Wilson during World War I.

Section 606(c) of the Communications Act grants the President broad powers to control radio stations in the event of war or emergency:

Upon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station or device and/or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the

133. 47 U.S.C. § 606.

owners.¹³⁴

After its enactment in 1934, this provision was slightly amended in 1951 to clarify the President's power to use, control, or close radio facilities that an enemy might use for navigation.¹³⁵

Section 606(d) empowers the President to seize control of wireline telecommunications facilities in the event of war:

Upon proclamation by the President that there exists a state or threat of war involving the United States, the President, if he deems it necessary in the interest of the national security and defense, may, during a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate, (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.¹³⁶

This section was not part of the Communications Act in 1934. Congress added the provision in 1942, seven weeks after the

134. *Id.* § 606(c).

135. Act of Oct. 24, 1951, c. 553, § 1, 65 Stat. 611.

136. 47 U.S.C. § 606(d).

attack on Pearl Harbor.¹³⁷

Other parts of section 606 confer related powers on the President. Section 606(a) empowers the President in time of war to direct that communications in his judgment that are essential to national security be given priority with any carrier subject to the Communications Act.¹³⁸ Section 606(b) entitles the President to use the armed forces to prevent anyone from using physical force to obstruct communications during war.¹³⁹ Section 606(e) entitles the President to set the just compensation for use of facilities under sections 606(c) or 606(d).¹⁴⁰ Section 606(f) preserves (with exceptions) the taxation and police powers of the states against the effect of sections 606(c) or 606(d).¹⁴¹ Section 606(g) explains that sections 606(c) or 606(d) do not “authorize the President to make any amendment to the rules and regulations of the FCC which the FCC would not be authorized by law to make; and nothing in subsection (d) shall be construed to authorize the President to take any action the force and effect of which shall continue beyond the date after which taking of such action would not have been authorized.”¹⁴² Section 606(h) sets out penalties for noncompliance.¹⁴³

RELATED PROVISIONS OUTSIDE THE COMMUNICATIONS ACT

Two other statutes that are not part of the Communications Act are relevant to foreign investment in telecommunications and address the same national security concerns addressed by section 310(b). These statutes are the Exon-Florio Amendment

137. Act of Jan. 26, 1942, c. 18, § 1, 56 Stat. 18.

138. 47 U.S.C. § 606(a).

139. *Id.* § 606(b).

140. *Id.* § 606(e).

141. *Id.* § 606(f).

142. *Id.* § 606(g).

143. *Id.* § 606(h).

and the Foreign Agent Registration Act.

Exon-Florio Amendment

The 1988 Exon-Florio Amendment to the Defense Production Act of 1950 is the primary and most controversial law governing foreign investment in the U.S..¹⁴⁴ In implementing the Exon-Florio Amendment, President Reagan established the Committee on Foreign Investment in the United States (CFIUS)¹⁴⁵ and authorized it to enforce and administer the Amendment.¹⁴⁶

Under the Exon-Florio Amendment, the federal government has the discretion to block any proposed investment that appears to threaten national security. This determination is made by CFIUS, upon request by a potential investor or a CFIUS agency.¹⁴⁷ CFIUS analyzes whether the investment will result in foreign control that will impair national security. After receiving a CFIUS report, the President has fifteen days to determine the appropriate course of action¹⁴⁸ and to report the reasons for his decision to Congress.¹⁴⁹

Considering its mode of enforcement, the Exon-Florio Amendment has rarely been implemented. As of 1994, CFIUS had investigated fewer than five percent of the transactions of which it has been notified,¹⁵⁰ and of those the President

144. Exon-Florio Amendment to the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418 § 5021, 102 Stat. 1107, 1425 (codified at 50 U.S.C. § 2170).

145. See Interim Directive Regarding Disposition of Certain Mergers, Acquisitions, and Takeovers, 53 FED. REG. 43,999 (1988), *reprinted in* 50 U.S.C. § 2170.

146. See 50 U.S.C. § 2170(e); 31 C.F.R. § 800 (CFIUS regulations to implement Exon-Florio Amendment).

147. 50 U.S.C. § 2170(a).

148. *Id.* § 2170(c).

149. *Id.* § 2170(g).

150. Rick Wartmann, *Keep Out: Foreign Moves to Buy U.S. Defense Firms*

formally has blocked only one.¹⁵¹ A number of other foreign investors, however, have withdrawn their investment plans when faced with possible CFIUS opposition¹⁵² or when under heavy political pressure during a CFIUS investigation.¹⁵³

The Exon-Florio Amendment has been made tougher under two sets of additional provisions added in 1992 as part of the Defense Authorization Bill.¹⁵⁴ The Byrd Amendment¹⁵⁵ requires a mandatory investigation of acquisitions or takeovers by a foreign government or by companies controlled or "acting on behalf of" foreign governments, if such a transaction could "result in control" of a domestic company engaged in activities that "could affect national security."¹⁵⁶ The Bingham Amendment¹⁵⁷ prohibits foreign government-owned companies from purchasing U.S. defense contractors that are engaged in contracts requiring access to certain proscribed categories of information, or that are involved in contracts valued at more than \$500 million with the Defense or Energy Departments.¹⁵⁸ The provision does not apply if the Exon-Florio Amendment is not invoked to prevent the transaction.¹⁵⁹

Face Higher Hurdles, New National Security Law Orders Tighter Scrutiny in Wake of Thomson Case—Would Clinton Be Tougher?, WALL ST. J., Nov. 2, 1992, at A6.

151. *Id.*

152. See Martin Tolchin, *Agency on Foreign Takeovers Wielding Power*, WALL ST. J., Apr. 24, 1989, at D6.

153. See Alan F. Holmer, Judith H. Bello & Jeremy O. Preiss, *The Final Exon-Florio Regulations on Foreign Direct Investment: The Final Word or Prelude to Tighter Controls?*, 23 LAW & POL'Y INT'L BUS. 593, 611 (1992).

154. Pub. L. No. 102-484, 106 Stat. 2315 (1992) (codified at 50 U.S.C. § 2170).

155. 50 U.S.C. § 2170.

156. *Id.* § 2170(b).

157. *Id.* § 2170(a).

158. *Id.*

159. *Id.* § 2170(a)(b).

Foreign Agent Registration Act

The Foreign Agent Registration Act (FARA)¹⁶⁰ requires agents of foreign principals to register with the U.S. Attorney General¹⁶¹ and submit to the labelling of any "political propaganda" that they wish to distribute in the U.S.¹⁶² The term "foreign principal" includes not only foreign governments and foreign political parties (broadly defined to include organizations such as the Irish Republican Army),¹⁶³ but also citizens of countries other than the U.S. and corporations or partnerships organized outside of the U.S.¹⁶⁴ An "agent" is anyone who engages in political acts or lobbying, performs public relations services, or solicits money under the control of a foreign principal.¹⁶⁵ Commercial activities and diplomats, among others, are exempt.¹⁶⁶

FARA defines "political propaganda" as a communication intended to influence the recipient in some way relating to the policies of a foreign principal, or to instigate "riot" or the overthrow of government.¹⁶⁷ But the statutory definition is inclusive, not exclusive. Political propaganda "includes," but evidently is not limited to, the following conduct:

160. 22 U.S.C. §§ 611-21.

161. *Id.* § 612.

162. *Id.* § 614.

163. *Id.* § 611(b)(1); *see also* Attorney Gen. v. Irish People, Inc., 684 F.2d 928, 938, 942 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983); Attorney Gen. v. Irish Nat'l Aid Comm., 346 F. Supp. 1384, 1390-91 (S.D.N.Y.), *aff'd*, 465 F.2d 1405 (2d Cir.), *cert. denied*, 409 U.S. 1080 (1972).

164. 22 U.S.C. §§ 611(b)(2), (3).

165. *Id.* § 611(c).

166. *Id.* § 613.

167. *Id.* § 611(j).

any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government of a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.¹⁶⁸

FARA also defines the “disseminating” of political propaganda inclusively rather than exclusively. The term “includes transmitting or causing to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce or offering or causing to be offered in the United States mails.”¹⁶⁹

Section 614(a) provides that persons required to register under FARA must send the Attorney General within forty-eight hours two copies of any political propaganda that the agent

168. *Id.*

169. *Id.*

transmits through the mails or by other means to two or more persons.¹⁷⁰ In addition, the agent must attach an identification statement: The "political propaganda [must be] conspicuously marked at its beginning with, or prefaced or accompanied by, a true and accurate statement, in the language or languages used in such political propaganda, setting forth the relationship or connection between the person transmitting the political propaganda or causing it to be transmitted and such propaganda."¹⁷¹ In 1987, the Supreme Court upheld this statute

170. "Every person within the United States who is an agent of a foreign principal and required to register under the provisions of this Act and who transmits or causes to be transmitted in the United States mails or by any means or instrumentality of interstate or foreign commerce any political propaganda for or in the interests of such foreign principal (i) in the form of prints, or (ii) in any other form which is reasonably adapted to being, or which he believes will be, or which he intends to be, disseminated or circulated among two or more persons shall, not later than forty-eight hours after the beginning of the transmittal thereof, file with the Attorney General two copies thereof and a statement, duly signed by or on behalf of such agent, setting forth full information as to the places, times, and extent of such transmittal." *Id.* § 614(a).

171. *Id.* § 614(b). The identification statement must additionally state

that the person transmitting such political propaganda or causing it to be transmitted is registered under this Act with the Department of Justice, Washington, District of Columbia, as an agent of a foreign principal, together with the name and address of such agent of a foreign principal and of such foreign principal; that, as required by this Act, his registration statement is available for inspection at and copies of such political propaganda are being filed with the Department of Justice; and that registration of agents of foreign principals required by the Act does not indicate approval by the United States Government of the contents of their political propaganda.

Id. The Attorney General, "having due regard for the national security and the public interest," is empowered to prescribe by regulation "the language or languages and the manner and form in which such statement shall be made and require the inclusion of such other information contained in the registration

against a First Amendment challenge.¹⁷²

Congress enacted FARA a year before the outbreak of World War II in response to the distribution of publications sponsored by various Nazi and Communist groups.¹⁷³ FARA was not intended to limit the distribution of such propaganda, but to require the distributor to disclose the source so that its American audience could make an informed decision about the material's accuracy.¹⁷⁴ Congress made significant amendments to FARA in 1963, expanding the statute to control the activities of foreign lobbyists.¹⁷⁵

It is important to note how FARA overlaps with section 310(a) of the Communications Act. *Neither* FARA nor section 310(a) directly bars any foreigner from speaking. Section 310(a) indirectly inhibits speech by barring foreign governments from owning transmission media, but not from using others' networks. Likewise, FARA does not prevent foreign principals from speaking, but labels their speech. Nevertheless, FARA is the broader measure. Section 310(a) targets foreign governments and their representatives; FARA covers almost any political activity, whether or not sponsored by a foreign sovereign. And FARA covers customers of any carriage facility, a group excluded by section 310(a). FARA also covers the print media as well as electronic transmissions.

statement identifying such agent of a foreign principal and such political propaganda and its sources as may be appropriate." *Id.*

172. *Meese v. Keene*, 481 U.S. 1035 (1987); *see also* *United States v. Peace Information Center*, 97 F. Supp. 255 (D.D.C. 1951); *United States v. Auhagen*, 39 F. Supp. 590 (D.D.C. 1941).

173. Act of June 8, 1938, 52 Stat. 631. *See also* *Viereck v. United States*, 318 U.S. 236, 244 (1943); Michael I. Spak, *America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Foreign Bidder—A Statutory Analysis and Proposals for Reform of the Foreign Agents Registration Act and the Ethics in Government Act*, 78 KY. L.J. 237 (1990).

174. *United States v. Auhagen*, 39 F. Supp. 590 (D.D.C. 1941).

175. *See* Spak, *supra* note 173, at 246-49, 276.